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HAROLD B. WILLEY, C

No. 774 62

IN THE

Supreme Court of the United States

October Term, 1954

RAY WHITAKER and HARRY L. SWAIM, doing business as Blue Motor Coach Lines, *Appellants,*

v.

LOUISVILLE TRANSIT COMPANY, the CITY OF LOUISVILLE, and the DEPARTMENT OF MOTOR TRANSPORTATION, COMMONWEALTH OF KENTUCKY, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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May 6, 1955.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of Kentucky, entered on January 10, 1955, affirming a judgment of the Franklin Circuit Court of Kentucky entered on October 2, 1953. The latter judgment affirmed in part and reversed in part a final order of the Department of Motor Transportation of the State of Kentucky entered on March 2, 1952. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS AND MANDATE BELOW

The Opinion of the Court of Appeals of Kentucky is reported in 274 S.W. (2d) 391. The Franklin Circuit Court issued an unreported "Order and Judgment," which constituted its opinion. The Department of Motor Transportation of the State of Kentucky issued an unreported "Final Order" which constituted its opinion. Copies of these opinions and orders, and of the mandate of the Court of Appeals, are attached hereto as Appendix A.

JURISDICTION

The case at bar originated in a consolidated administrative proceeding before the Kentucky Department of Motor Transportation to resolve the conflicting claims asserted in petitions filed, respectively, by appellants, and by Louisville Transit Co.,[1] each asserting the right to operate a passenger motor bus service between downtown Louisville and the "Camp Taylor area," the former claiming under a certificate of convenience and necessity issued by the State, and the latter under a City franchise. A final order of the Department holding that both might operate was appealed, pursuant to KRS § 281.780, to the Franklin Circuit Court of Kentucky, which held against appellants' right to operate, and for that of Louisville Transit. This judgment was affirmed on appeal to the Court of Appeals of Kentucky, pursuant to KRS § 281.785 (4).

The judgment of the Court of Appeals was announced on June 25, 1954 (R. 486). A petition for rehearing, after briefs and argument thereon, was

[1] In the earlier stages of this case, appellee Louisville Transit Co. was known as Louisville Railway Co.

denied on December 17, 1954, by an order which modified the earlier text of the Court's opinion (R. 490). The opinion was further modified on January 10, 1955 (R. 494), and the mandate of the Court was issued on January 11, 1955 (R. 504). Notice of Appeal to this Court was filed in the Court of Appeals of Kentucky on March 16, 1955 (R. 505-507).

Jurisdiction is conferred on the Supreme Court to review this decision by direct appeal by Title 28, United States Code, Sections 1257(2) and 2101(c).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *King Manufacturing Co.* v. *Augusta,* 277 U.S. 100 (1928).

STATUTES INVOLVED

The statutory provisions here involved, Kentucky Constitution, Sections 3, 163 and 164, and Kentucky Revised Statutes, Sections 81.100, 81.110, 281.010(13), 281.635(1)-281.635(3), 281.635(6)-281.635(8) and 281.665 are set forth in Appendix B hereto.

QUESTIONS PRESENTED

The Court of Appeals of Kentucky has construed the provisions of the Kentucky Constitution, Sections 3, 163 and 164, and the provisions of Kentucky Revised Statutes, Section 81.100, et seq., and Chapter 281, particularly the provisions of Sections 281.010 (13), 281.635 and 281.665, to require that the holders of a certificate of convenience and necessity duly issued for the operation of a passenger motor bus service, and used for upward of fifteen years in full compliance with the statutes and regulations applicable thereto, be summarily deprived of their operating

rights in favor of a competing carrier who holds a franchise from the City of Louisville, granted after the appellants' certificate was issued, upon the enlargement of the boundaries of the City of Louisville by the annexation of adjacent territory, so that the route in question had become an intracity route. The questions presented are:

1. Whether such provisions of the Kentucky Constitution and Statutes, as so construed and applied, impair the obligation of the contracts consisting of the certificate of convenience and necessity granted to the appellants in 1935, and of renewals thereof, in contravention of Article I, Section 10, of the Federal Constitution.

2. Whether such provisions of the Kentucky Constitution and Statutes, as so construed and applied, deprive appellants of their property without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution; to wit, their right to operate a passenger motor bus service established in accordance with and in reliance upon a certificate of convenience and necessity granted in 1935 and continuously in effect since then, and the tangible and intangible property used in rendering such service.

STATEMENT OF THE CASE

The Facts

The appellants, Ray Whitaker and Harry L. Swaim, partners, doing business under the name of "Blue Motor Coach Lines," have been operating, since 1935, a passenger motor bus service from a terminal in the central part of the City of Louisville, Kentucky, to an area known as Camp Taylor, then a suburb of

Louisville. In that year, a certificate of convenience and necessity was issued to them pursuant to Kentucky statutory provisions, upon their acquisition of the route by purchase from predecessor operators (R. 322-23). This certificate has been periodically and routinely renewed since that time, and no question was raised with respect thereto until the controversy now before the Court arose.

The suburban portion of this bus route runs through territory which the City of Louisville annexed by Ordinance effective June 30, 1950 (R. 467-469), pursuant to provision made by statute for such annexations.[2]

Louisville Transit Company had been operating local transit lines throughout the city prior to the 1950 annexation, under a 20-year franchise secured from the city in 1941. By its express terms, the franchise was not exclusive (R. 465, p. 13). On January 28, 1951, Louisville Transit, relying upon its city-wide franchise, extended one of its bus routes into the Camp Taylor area, thereby substantially duplicating the appellants' established route. The City acquiesced in this extension (R. 466).

The Proceedings Below

Appellants, on February 6 and 8, 1951, filed petitions with the state Department of Motor Transportation challenging the right of Louisville Transit to extend its route to the Camp Taylor area, and appealing, pursuant to KRS § 281.635(3), from the City's

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[2] The statutory provisions are set forth in the Appendix, pp. 24-25, infra. An earlier territorial annexation by the City of Louisville, under the same statutory authority, gave rise to a case recently decided by this Court, *Howard* v. *Commissioners*, 344 U.S. 624 (1953), involving unrelated issues.

acquiescence therein (R. 164-172). Louisville Transit's responsive pleading challenged appellants' right to continue to operate over their established route, on the ground that the territorial annexation had made the route intracity, and that appellants, never having operated intracity prior to the enactment of the new Motor Carrier Act in 1950, could claim no "grandfather" rights (R. 175-177, 179-187). These responsive pleadings were treated by the administrative agency as a separate proceeding for affirmative relief. The Department refused the relief sought by both carriers and ruled that both were entitled to serve the Camp Taylor area (Appendix, pp. 1-11, infra).

On separate appeals by appellants (R. 3-42), Louisville Transit (R. 129-155) and the City of Louisville (R. 100-115), the Franklin Circuit Court held for Louisville Transit on all points in a brief order upholding Louisville Transit's right to operate over the Camp Taylor route, and ordering the cancellation of appellants' certificate (Appendix, pp. 12-14, infra). The Court of Appeals affirmed, with opinion, one judge dissenting (Appendix, pp. 15-22, infra).

The Scope of This Appeal

Appellants do not here challenge so much of the decision below as permits Louisville Transit to continue to serve the Camp Taylor area. While they urged in the Kentucky courts that Louisville Transit should not be permitted, under Kentucky law, to invade their territory, they make no claim here that the decision of the Kentucky courts in this respect raises any Federal question. Appellants claim no constitutional right to a monopoly position.

This appeal is based solely upon so much of the judgment below as deprives appellants of the right

to continue operating over the route they have served since 1935, without any question as to their continued full compliance with the statutes and rules applicable to such operation. They submit that the monopoly of this service granted to Louisville Transit by the judgment below operates to deprive them of rights granted to them by the Constitution of the United States.

The relief appellants seek here is a re-instatement of the order of the Department of Motor Transportation.

The Federal Questions Were Raised

The administrative proceeding was considered at issue, and was set down for hearing, immediately after the filing of responsive pleadings which first challenged appellants' right to operate (R. 194). Thus, appellants' first opportunity to reply to Louisville Transit's plea for affirmative relief came at the administrative hearing, where counsel asserted constitutional protection for appellants' operating certificate (R. 305-306). This claim was discussed and upheld by the Examiner (R. 208). In Exceptions to the Examiner's Report, appellants again asserted the inviolability of their operating rights (R. 221, 230-231). The Final Order of the Commissioner referred to the constitutional claim, and upheld the right of appellants to continue to operate (R. 280; Appendix, pp. 10-11, infra).

These constitutional claims were re-iterated in the Franklin Circuit Court[3] and in the Court of Appeals

[3] Separate appeals were taken to the Franklin Circuit Court by appellants (R. 3-42), by Louisville Transit (R. 129-155) and by the City (R. 100-115), the latter two challenging the appellants' right to operate. Appellants responded with motions to dismiss, demurrers and general denials (R. 116-118, 156-158), which raised the constitutional questions. The Attorney General of Kentucky,

of Kentucky[4], as appropriate under the procedures followed in those courts. The opinion of the Court of Appeals referred to appellants' claims of contract and property rights protected against impairment by the Federal Constitution (Appendix pp. 19-20, infra) and concluded with the explicit statement:

> "The contention that rights guaranteed to Blue Motor by the Federal Constitution have been violated has been considered and found not to be sustainable." (Appendix p. 22, infra.)

THE QUESTIONS ARE SUBSTANTIAL

Two men who purchased the operating rights for a bus line in 1935, and who have conducted the service since then in full compliance with the applicable statutes and regulations, would be forced to discontinue this service, for no fault of their own, under the Kentucky court's decision. Louisville Transit, which bought operating rights for local transit service with-

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appearing in support of the administrative decision, filed similar pleadings (R. 70, 71, 159). With the issues thus joined, appellants argued the federal constitutional questions by brief submitted to the Circuit Court (pp. 4-6, 14-15, 36-40, 50-56, 60), and by oral argument. The Circuit Court rendered a short "Order and Judgment" without opinion (R. 95-97, 124-126, 161-163, Appendix, pp. 12-14, infra).

[4] Appeals to the Court of Appeals were taken by leave of the Franklin Circuit Court (R. 97, 126, 163). No assignments of error or analogous specification of the grounds for review were filed initially (R. 477-486). Appellants reiterated their constitutional claims in their brief (pp. 9, 18-19, 37-42, 52-61), in their reply brief (pp. 30-48), and in argument. The opinion of the Court of Appeals, as first issued on June 25, 1954, cited appellants' constitutional contention (R. 489-A, Appendix, p. 6) and rejected it. Appellants again asserted their claims under the impairment of contract and due process clauses of the Federal Constitution in their Petition for Rehearing and Brief (R. 489-A, Petition and Brief, pp. 7-12, 52-55, 68-69).

in Louisville six years after appellants secured their certificate would be given the windfall of additional exclusive territory, under the judgment below.

Appellants submit that this result not only deprives them of constitutional rights, but raises important questions of national significance as to the nature of the rights granted carriers and other public utility enterprises under certificates of convenience and necessity, particularly in the very busy field of municipal territorial annexation.

The Decision Below Undermines Fundamentally the Status of the Certificate of Convenience and Necessity

Public utility regulation, federal and state, has largely been cast in the mold of the certificates of convenience and necessity for the past 30 or 40 years. A matrix of transportation, communication, light and power, and a host of other services has developed throughout the nation under the legal structure provided by these certificates. Thousands of enterprises have invested billions of dollars in reliance upon the rights conferred by such certificates.

Statutes creating such certificates have universally defined the public policy under which the enterprises are to be regulated, made clear the retention of flexible regulatory authority in the administering governmental agencies, and defined, with varying degrees of precision, the scope, character and limitations of the authorized service. As a counterpart of these regulatory safeguards for the benefit of the consumer and the public, the certificate provides the utility at times with special privileges (easements over public highways, eminent domain, etc.) but, invariably, security of its operating privileges. Without exception, these statutes assure a certificate holder of retention

of his certificate (in some cases, an exclusive grant, in others, a non-exclusive one) except for his own misdeeds, which must be proved in the framework of procedural due process. It is inconceivable that the large capitalization typically required for utility service would have been forthcoming without some minimum security of tenure.

The Kentucky decision here under review destroys this minimum security. Appellants' tenure of 20 years would be abruptly cut off for no misdeed of their own. A bounty of additional territory would be handed to a competitor which never served it before, to be exploited on a monopolistic basis, when the competitor's only colorable claim stems from a franchise expressly non-exclusive, and which was required by Constitution and statute to be non-exclusive. Ky. Const. (1891) § 3; KRS (1954) § 96.030.

The Kentucky decision strikes at the fundamental status of the certificate. If the certificate assures the continuance of properly-used operating rights, the Kentucky decision is wrong. If the Kentucky decision is correct, no utility can be secure in its operating rights.

The Decision Below Creates a No-Man's-Land for Utility Services for Our Rapidly Growing Suburbs

The Kentucky Court concedes "for the purpose of this discussion" that the appellants' certificate "has some of the attributes of a property right" (Appendix p. 20, infra). Nevertheless, it ordered cancellation of the certificate on the ground that the existence of general statutory authority for municipal annexation of territory, coupled with the assignment of regulatory jurisdiction to municipalities, made the appellants' certificate defeasible upon annexation of the territory involved.

The argument proves too much. Of course, Kentucky can allocate regulatory authority between state and municipal agencies, as it can among state agencies. During the term of the certificate here in question, three different state agencies in succession have had regulatory jurisdiction over the appellants' bus service. Yet it was never suggested that a governmental re-organization destroys the established privileges of those being regulated. The fact that statutes are often amended can hardly be the basis for a claim that all rights acquired under a statute are defeasible if a later legislature chooses to amend the statute.

The Kentucky Court's reasoning cannot, of course, be limited to motor bus transportation. Thus, a gas company which laid its pipes in the Camp Taylor area many years before its annexation to Louisville in 1950, in perfect compliance with the State statutes then applicable, would now be compelled summarily to dig out its installations and clear the streets if the existing city gas company can exhibit a "city-wide" franchise. The annexation of a suburb might, depending on the franchise situation in the old city, require a general uprooting of gas, water, electricity, telephone and trolley car facilities, in deference to the priority of municipal franchises. Bus operators also must make substantial investments to provide service, and their investment is just as vulnerable to summary cancellation of operating rights. The record shows that the certificate in question in this case was "purchased" in 1935 (R. 322-23) in accordance with provision made for purchase under Kentucky law.[5]

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[5] ". . . No certificate or permit may be transferred without the consent of the Commission authorizing such transfer. Said Com-

The certificates held at the time of the administrative proceedings below were carried on the appellants' books at a value of $15,000 (R. 453). The investment of appellants in their bus operations is almost $200,000 (R. 453), much of which would obviously have only scrap value if their operating rights were taken away.[6]

The decision of the Kentucky Court, if permitted to stand, would seriously impair the provision of public utility services for the rapidly growing suburbs bordering our cities.[7] In 1935, and at any time until 1950, the appellants or any other utility company could have secured operating rights in the Camp Taylor area only from an agency of the State of Kentucky. No franchise could have been purchased from the City of Louisville by appellants for transportation or utility services in an area which was then

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mission is authorized to prescribe the conditions precedent to such transfer and to make any necessary rules and regulations pertaining thereto." Kentucky Acts (1932), c. 104, Art. 4, § 3; Carroll's Kentucky Statutes (1935) § 2739j-71. Substantially similar provision is made in the present statute, Kentucky Acts (1950), c. 63, § 13(7); KRS (1954) § 281.630(7). Similar purchases of certificates under federal regulation were involved in United States v. Rock Island Motor Trans. Co., 340 U.S. 419 (1951).

[6] The figures given include other bus routes operated by appellants (R. 284-85, 289-91), but the Camp Taylor route is their principal operation.

[7] The 1950 U.S. Census of Population showed a tremendous growth of population living in suburban areas. Thus, while the population of the United States as a whole increased 14.9% between 1940 and 1950 (page xii), the population of "the outlying parts of standard metropolitan areas" increased 35.5% (page xxxii). Even this figure does not give the full picture of suburban growth because the figures for central cities were based on their legal boundaries at the time of the two censuses, respectively. Thus, annexations to central cities between 1940 and 1950 were reflected in the 1950 Census as increases in the population of the central cities and reductions in that of the suburban areas ("outlying parts").

not a part of the City, however prophetic the appellants might have been as to subsequent annexation. The decision of the Kentucky Court of Appeals in the case at bar would also make the State agency, the only one which could have granted operating rights, powerless to provide the minimum guaranty which any enterprise would expect in making a substantial investment of this character: that it would be assured continued operating rights so long as it provided good service and complied with the laws.

The No Man's Land of regulation which would result if the decision of the Court below were permitted to stand would, we submit, seriously obstruct the development of public utility services for our growing suburbs, wherever State "home rule" legislation for municipalities is susceptible of the construction here given the Kentucky statutes. The annexation of suburbs by cities throughout the country is proceeding at a very rapid rate,[8] and giving rise to a variety of

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[8] A recent special survey by the Bureau of the Census entitled "Municipal Annexations and Detachments: April 2, 1950-April 1, 1951" indicates the frequency of municipal annexations. During that single year, 672 out of 7,291 incorporated places in the United States with a population of 1,000 or more carried out 1,569 annexations or detachments. (Throughout the report no breakdown is given between annexations and detachments, but it is stated that "the great majority were annexations".) The larger municipalities within this category showed even a greater rate of annexation. Thus, 22.4% of the places with population of 10,000 or more carried out an average of 3.4 annexations each during the single year. Of the places with population of 50,000 or more, 28.9% carried out an average of almost 5 annexations each. Geographic Reports (U.S. Dept. of Commerce, Bureau of the Census, July 1, 1954) Series GEO. No. 3 (Revised). In the detailed material contained in this report, the City of Louisville, Kentucky, is shown to have carried out only one annexation during the year, presumably the annexation of the Camp Taylor area involved in this appeal, which became effective July 1, 1950. By this annexation, Louisville added 9.9 square miles to its former area of 42.8 square miles.

legal problems.[9]

The precise question involved in the case at bar was before the highest court of Alabama in *Town of Fultonsdale* v. *Clelland Bus Lines,* 254 Ala. 225, 48 So. (2d) 21 (1950). Under a constitutional provision similar to that of Kentucky,[10] the Alabama court upheld the right of a passenger motor bus carrier to continue operating after the territory it served, previously unincorporated, became a town, despite lack of a permit from town officials. In *Southwestern Gas & Electric Co.* v. *City of Gilmer,* 123 F. Supp. 11 (E.D. Texas 1954), which turned on different issues, the utility which had served the territory newly incorporated into a municipality was again upheld in its right to continue its service. *City of Wichita Falls* v. *Bowen,* 143 Tex. 45, 182 S.W. (2d) 695 (1944), involved the rate of fare; the right to continue to serve the annexed territory was not even raised. No case has been found where the utility serving a suburb was ousted because of territorial annexation.

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[9] During the past six months, four discussions of legal problems involved in municipal annexation have appeared in as many law journals, Mendelson, Suggestions for the Improvement of Municipal Annexation Law (1954) 8 Vanderbilt L. Rev. 1; Towe, Incorporation, Annexation, and Detachment of Ohio Municipalities (1955) 6 Western Reserve L. Rev. 146; Comment, Extending Corporate Limits (1955) 26 Miss. L. J. 174; Case, (1954) 38 Minn. L. Rev. 170.

[10] Ala. Const. (1901) § 220: "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village." Cf. Ky. Const. (1891) § 163, Appendix, p. 23, infra.

The Cancellation of Appellants' Certificate Impairs the Obligation of Contract

It is firmly established in the decisions of this Court that the grant of operating rights to a public utility constitutes a contract, protected from impairment by Article I, Section 10, of the Federal Constitution under the *Dartmouth College case,* 14 U.S. 518 (1819). The case of *Detroit United Railway* v. *Michigan,* 242 U.S. 238 (1916), is directly in point. There, a street railway company had been operating in the City of Detroit and in its suburbs. When the city boundaries were extended by annexation to include some of these suburbs, the city sought to subject the formerly suburban operations of the transit line to the regulations respecting rates of fare applicable within the old city boundaries. This Court held that the contractual rights of the transit company stemming from the franchises granted by the predecessor suburban communities were protected after annexation by the contract clause of the Constitution. Earlier decisions of the court, *City Railway Co.* v. *Citizens' Street Railroad Co.,* 166 U.S. 557 (1897) and *Houston & Texas Central Ry. Co.* v. *Texas,* 170 U.S. 243 (1898), and a later one, *Northern Ohio T. & L. Co.* v. *Ohio,* 245 U.S. 481 (1918), similarly upheld claims of utility companies under the contract clause.

In cases other than those involving franchises or certificates, this Court has also consistently held that changes of political boundaries of local governments cannot, under the Constitution, impair the contractual rights of those who dealt with the predecessor governmental authority. The successor local government is held liable for the obligations of its predecessor. *Mt. Pleasant* v. *Beckwith,* 100 U.S. 514 (1880); *Shapleigh* v. *San Angelo,* 167 U.S. 646 (1897); *Graham* v.

Folson, 200 U.S. 248 (1906); see also *City of Decatur* v. *Thames Bank & Trust Co.,* 84 F. (2d) 105 (C.C.A. 5th, 1936); *Cincinnati N. O. & T. P. Ry. Co.* v. *City of Lexington,* 86 F. Supp. 913 (E.D. Ky. 1949).

This doctrine has been equally accepted in the field of international law, where the liabilities of annexed territory are held to attach to the new sovereign. 1 Moore, International Law Digest (1906) 334-429; 1 Hackworth, Digest of International Law (1940) 539-567.

The Cancellation of Appellants' Certificate Deprives Them of Property Without Due Process of Law

Equally firmly established is the rule that public utility operating privileges, whether in the form of certificates of convenience and necessity or of franchises, are deemed vested property rights, protected by the due process clause of the 14th Amendment. *Frost* v. *Corporation Commission,* 278 U.S. 515 (1929), so held, the Court saying that a certificate of convenience and necessity issued by a state agency for the operation of a cotton gin "is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment" (at 519-520). This decision followed a line of earlier cases which invoked the due process clause to protect utility franchises. *Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U.S. 649 (1912); *Owensboro* v. *Cumberland Tel. & Tel. Co.,* 230 U.S. 58 (1913); *Cuyahoga River Power Co.* v. *Akron,* 240 U.S. 462 (1916); *Los Angeles* v. *Los Angeles Gas & Electric Corp.,* 251 U.S. 32 (1919).

Recent litigation in this field has tended to turn on questions of statutory construction, rather than on

Constitutional issues, since regulatory statutes give thorough recognition to the vested rights of utility companies, whether through "grandfather clauses," see *Stanley* v. *Public Utilities Commission*, 295 U.S. 76 (1935), or through the protection of certificated rights against subsequent diminution, see *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951); *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450 (1951).

The fundamental holding of the *Frost case*, that a certificate of convenience and necessity is protected under the contract and due process clauses of the Constitution, has stood unchallenged in this Court since its rendition.

The recognition of certificates as property rights finds support in other fields of law. Thus, federal income taxes are levied on capital gain resulting from the sale of an analogous certificate at a profit. *Jones* v. *United States*, 9 F. Supp. 973 (D. Colo. 1951), aff'd. 194 F. (2d) 783 (CCA 10th, 1952). Again, in mergers and consolidations of carriers and other public utilities, where the financial structure of the new corporation must be approved by Federal or State regulatory authorities, recognition has consistently been given to franchise or good will value, which is essentially the value of the certificate. Beck and Bogue, Motor Carrier Unifications, (1941) 50 Yale L. J. 1376, 1399, et seq. Certificates issued by the Interstate Commerce Commission may be validly mortgaged even though a transferee of the rights requires Commission approval to exercise them. *Richardson* v. *National Acceptance Co.*, 179 F. (2d) 1 (C.C.A. 7th 1950), cert. denied, 339 U.S. 981 (1950); see (1950) 50 Columbia L. Rev. 1139.

The Kentucky Statutes Under Which Appellants Secured and Exercised Their Operating Rights Created Contractual and Property Rights

The Kentucky Motor Carrier Act of 1932, under which the appellants' first certificate of convenience and necessity was issued in 1935 for the route here in question, provided:

> ". . . the Commission shall have no power to refuse to renew any existing permit or certificate, or any permit at any time granted by it, or to cancel any such permit or certificate whenever issued, except for just cause and after a hearing . . . "[11]

A right of appeal to the court was given to the holder "or owner" of a permit or certificate.[12] Similar provision has been retained in the Kentucky law through several major revisions of the motor carrier act.[13]

The statute in effect in 1935 permitted the sale of a certificate, with the permission of the regulatory agency.[14] The Motor Carrier Act of 1942 (which remained in effect until 1950) and under which appellants' certificate was regularly renewed, provided:

> Any certificate owned, held or obtained by any carrier may be sold, assigned, leased, bequeathed or transferred as other personal property upon

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[11] Carroll's Kentucky Statutes (1935 Ed.) § 2739j-72. See also ibid. § 2739j-89, which made provision for revocation, alteration or amendment of a certificate for violations of laws or rules and regulations.

[12] Ibid.

[13] See KRS (1949 Ed.) §§ 281.120, 281.130; KRS (1954 Ed.) §§ 281.650, 281.670.

[14] Carroll's Kentucky Statutes (1935 Ed.) § 2739j-71.

approval by the Division of Motor Transportation . . ."[15]

Substantially similar provision is retained in the statute now effective.[16]

The Kentucky Court of Appeals has quite explicitly held that the issuance of a certificate of convenience and necessity creates contractual and vested property rights in the grantee:

> "Such a grant or right is in the nature of a franchise, and though this is not exclusive it is a property right which may be protected from unlawful interference . . ." *Reo Bus Lines* v. *Southern Bus Lines,* 209 Ky. 40, 272 S.W. 18 (1925).

Kentucky has for many years levied a franchise tax on "franchises" of public service corporations, measured by their value,[17] which is applied to certificates of convenience and necessity, including the certificate here in question.

In all these ways, Kentucky held out to appellants a protected contractual and property status in the form of a certificate of convenience and necessity. In reliance upon these representations, appellants purchased a certificate and have operated a public service for 20 years, with a substantial investment. They seek here constitutional protection against the arbitrary destruction of these rights.

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[15] KRS (1949 Ed.) § 281.110(2).

[16] KRS (1954 Ed.) § 281.630(7). The current statute is even more specific in dealing with transfers of certificates resulting from corporate mergers and consolidations, ibid. § 281.630(8), (9).

[17] KRS (1954 Ed.) § 136.120.

CONCLUSION

It is submitted that the decision of the Court of Appeals of Kentucky construes Kentucky constitutional and statutory provisions in a manner inconsistent with the Federal Constitution. The decision has far-reaching implications for the development of utility services in our rapidly growing suburban areas, and raises serious questions about the whole structure of Federal and State regulation based on the certificate of convenience and necessity. We believe these far-reaching questions are of public importance, and are therefore substantial and merit plenary consideration by this Court for their resolution.

Respectfully submitted,

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May 6, 1955.